JUN 19 1968

No. 22,587

IN THE

United States Court of Appeals

For the Ninth Circuit

DANIEL SORANNO,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE

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JURISDICTION

This a timely[1] appeal from a judgment of conviction in the United States District Court for the Eastern District of California for a violation of Title 50 U.S.C. App. § 462 (failure to report for induction).

Jurisdiction in the District Court was based upon Title 18 U.S.C. § 3231. Jurisdiction in this Court is conferred by Title 28 U.S.C. § 1291.

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[1]Judgment and sentence were entered on the record in this case on November 1, 1967. Notice of appeal was filed, pursuant to Rule 37(a)(2) F. R. Crim. P., on November 6, 1967.

STATEMENT OF THE CASE

Proceedings Below

By a one count indictment (Cr. No. S-175) filed on September 1, 1967, appellant was charged with a violation of Title 50 U.S.C. App. § 462 (failure to report for induction). On October 2, 1967 appellant entered a plea of not guilty and on October 30, 1967 a waiver of jury trial was filed and the appellant was tried before the Honorable Thomas J. MacBride sitting without a jury. Appellant was found guilty of the charge contained in the indictment on October 30, 1967 and on that date was sentenced to a term of imprisonment for three years.

Facts

The appellant initially registered for the draft on May 19, 1960, approximately 18 months after his eighteenth birthday.[2] On August 23, 1961 he was classified I-A.[3] After a pre-induction physical examination and on July 16, 1963, the appellant was found acceptable for military service.[4] On October 18, 1963 an order to report for induction was mailed to appellant to report on November 12, 1963.[5] Thereafter and on October 30, 1963 appellant's induction was postponed

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[2]Government Exhibit No. 1; the appellant's selective service file was admitted into evidence at the trial as Government Exhibit No. 1, although it appears to be denominated Government's No. 12 in appellant's Opening Brief. On page 4 of Government Exhibit No. 1 the appellant states his reasons for his late registration.

[3]Government Exhibit No. 1, p. 12.

[4]Government Exhibit No. 1, pp. 12 and 26.

[5]*Id.*, pp. 12 and 27.

and he was re-classified I-S(C) until June, 1964 because of his status as a full time student.[6]

On September 20, 1964 the appellant requested the selective service form for a conscientious objector (i.e., SS form 150).[7] On September 30, 1964 the local board received the completed SS form 150 and on October 28, 1964 classified the appellant II-S until June, 1965.[8] On September 15, 1965 the appellant was classified I-A and a notice of classification (SS form 110) was mailed to him on that date.[9] On September 16, 1965 the appellant wrote to his local board requesting a student deferment and another SS form 150 for conscientious objectors.[10]

The appellant was then re-classified I-O by his local board on October 15, 1965 and a notice of classification (SS form 110) was mailed on October 16, 1965.[11] On October 26, 1965 the appellant wrote to the board appealing his I-O classification.[12] Thereafter on November 10, 1965 the local board re-opened the appellant's case and classified him I-A and mailed a new notice of classification on November 12, 1965.[13] The appellant then wrote another appeal letter to his board on November 21, 1965.[14] The Selective Service file was for-

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[6]*Id.*, pp. 12, 28, 31, and 38; as to the I-S(C) classification see 32 CFR 1622.15(b).

[7]Government Exhibit No. 1, pp. 12 and 40.

[8]*Id.*, p. 12; see 32 CFR 1622.25.

[9]*Id.*, p. 12.

[10]*Id.*, p. 60, see also p. 62.

[11]Government Exhibit No. 1, p. 12.

[12]*Id.*, p. 63.

[13]*Id.*, pp. 12 and 13.

[14]*Id.*, p. 65.

warded to the appeal board on December 17, 1965[15] and on October 12, 1966 the Appeal Board for the Northern District of California, after an investigation and recommendation by the Department of Justice, unanimously classified the appellant I-A.[16]

After being classified by the Appeal Board I-A and on October 18, 1966 the appellant was ordered to report for induction on November 3, 1966.[17] On October 22, 1966 the appellant wrote to the local board requesting, in effect, that he not be inducted.[18] The local board advised the appellant by letter dated October 26, 1966 that his classification was not re-opened and to report for induction as ordered.[19]

On October 31, 1966 the appellant's file was forwarded to State Headquarters of the Selective Service System and reviewed by that office.[20] The registrant failed to report for induction as ordered on November 3, 1966[21] and on November 15, 1966 wrote to the local board requesting another opportunity to report so that he might exhaust his administrative remedies.[22]

The appellant was then afforded another opportunity to report for induction under the original induction order by letter of February 3, 1967 ordering him

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[15]*Id.*, pp. 13 and 67.
[16]*Id.*, pp. 13, 72-81, and 101.
[17]*Id.*, pp. 13 and 103.
[18]*Id.*, pp. 105-106.
[19]Government Exhibit No. 1, p. 112.
[20]*Id.*, pp. 13, 113, 118-120.
[21]*Id.*, p. 13.
[22]*Id.*, pp. 115-116.

to report for induction on February 9, 1967.[23] On February 8, 1967, the appellant requested and was granted a transfer for induction to a local board in Sacramento, California with a reporting date of March 8, 1967.[24] On the latter date, i.e., March 8, 1967, the appellant failed to report for induction.[25] The reasons for not reporting are spelled out by the appellant on pages 74-75, 82, 85-86, and 94-95 of the Reporter's Transcript.

ARGUMENT

I. THE DISTRICT COURT DID NOT ERR IN DENYING THE MOTION FOR JUDGMENT OF ACQUITTAL SINCE THE APPELLANT DID NOT EXHAUST HIS ADMINISTRATIVE REMEDIES.

A. Nowhere in appellant's argument does he mention the fact that he did not report to the local board or the induction station on March 8, 1967, the day he was ordered to report for induction. The threshold question therefore is whether the appellant can raise the defense of no basis in fact to his classification when he did not go to the brink of induction. The appellee respectfully submits that the propriety of the classification in this case is not open to attack. *Estep v. United States,* 327 U.S. 114 (1946); *Billings v. Truesdell,* 321 U.S. 542 (1944); *Daniels v. United States,* 372 F.2d 407 (9th Cir. 1967) at page 413, footnote 8; and *Williams v. United States,* 203 F.2d 85 (9th Cir. 1953), *cert. denied,* 345 U.S. 1003 (1953).

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[23] *Id.*, p. 130.

[24] *Id.*, pp. 13 and 133.

[25] *Id.*, p. 13, and Reporter's Transcript, p. 15.

At the trial of this case the appellant sought to avoid the exhaustion rule by asserting that he had an "excuse" for not reporting for induction.[26] He apparently abandons that position on appeal. However, the appellee respectfully submits that this is a singularly inappropriate case to disregard the fact that the appellant did not go to the brink of induction. First of all, the local board afforded the appellant an opportunity to report a second time after the receipt of his letter dated November 15, 1966 (Government Exhibit No. 1, pp. 115-116) wherein the appellant specifically requested to be ordered to report again so that he could appear at the induction station and thereby "get a judicial review in the courts to the fullest." He nevertheless failed to report on March 8, 1967.

Additionally, it is difficult to conceive as a valid excuse for not reporting the bare fact that the appellant was afraid to so report. It is submitted that this is not a proper ground for the relaxation of the exhaustion doctrine. Cf. *Donato v. United States,* 302 F.2d 468 (9th Cir. 1962).

B. Notwithstanding the above, the appellee respectfully invites the Court's attention to the Resume of the Inquiry contained on page 76 of Government Exhibit No. 1 and the recommendation of the Department of Justice on page 72 of Government Exhibit No. 1, both of which provide a basis in fact for the Appeal Board's classification of appellant. Cf. *Lingo v. United States,* 384 F.2d 724 (9th Cir. 1967); *Sal-*

[26]Reporter's Transcript, pp. 70-72.

amy v. United States, 379 F.2d 838 (10th Cir. 1967); and *Keefer v. United States,* 313 F.2d 773 (9th Cir. 1963).

CONCLUSION

For the foregoing reasons the District Court did not err in denying the motion for judgment of acquittal in this case and the judgment of conviction heretofore entered by the District Court should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JAMES J. SIMONELLI
Assistant United States Attorney